

Arbitration in the Aftermath of the Arab Spring: From Uprisings to Awards

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I. INTRODUCTION

The history of the Middle East is a rocky one of conquest, colonialism, and political upheaval. The origin of the current conflicts in the region can be traced back to the disintegration of the Ottoman Empire in the aftermath of World War I. The European powers filled the vacuum left by the absence of the Ottoman Empire in an interwar period marked by colonialism. Eventually, in the wake of World War II, middle eastern nations began to achieve independence, which lead to a Cold War period dominated by Arab Socialism.¹ The structures founded during the era of Arab Socialism were largely brushed away in 2011 as a wave of political unrest swept across the Middle East, threatening, and in some instances toppling, governments in the region.² The events of that year are known as the Arab Spring.³ The Arab Spring ignited in Tunisia when a young man, slapped by a security officer after refusing to pay a bribe, lit himself on fire in protest, starting a riot.⁴ The rioting sparked a full-blown revolution.⁵ Within a month, the leader of

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¹ There was a time in the late 1960s and early 1970s when Arab Socialism was “the political ideology of more than half of the fourteen independent Arab States.” ABDEL MOGHNY SAID & SAMIR AHMED, *ARAB SOCIALISM* 6 (1972).

² See Garry Blight et al., *Arab Spring: An Interactive Timeline of Middle East Protests*, THE GUARDIAN (Jan. 5, 2012, 10:45 AM), <http://www.guardian.co.uk/world/interactive/2011/mar/22/middle-east-protest-interactive-timeline>, for an interactive timeline of events related to the Arab Spring. Tunisia, Egypt, and Libya have already seen a change in government and the governments in Syria and Yemen are under heavy pressure from protests. *Id.*

³ *Id.*

⁴ *Witnesses Report Rioting in Tunisian Town*, REUTERS (Dec. 19, 2010, 2:59 PM GMT), <http://af.reuters.com/article/topNews/idAFJOE6BI06U20101219>; *How a Slap Sparked Tunisia's Revolution*, CBS NEWS (Feb. 20, 2011, 7:58 PM), <http://www.cbsnews.com/stories/2011/02/20/60minutes/main20033404.shtml>; Yasmine Ryan, *How Tunisia's revolution began*, AL JAZEERA (Jan. 26, 2011, 2:39 PM), <http://www.aljazeera.com/indepth/features/2011/01/2011126121815985483.html>.

⁵ CBS NEWS, *supra* note 4; Ryan, *supra* note 4.

Tunisia, President Zine Ben Ali, fled the country ending his twenty-three year reign.⁶

The revolution in Tunisia inspired similar protests in Egypt.⁷ The Egyptian protests, which began on January 25, 2011, culminated in the removal of long time president Hosni Mubarak on February 11.⁸ The unrest spread to Libya where, after hard fighting, NATO-backed rebels killed long-time leader Colonel Muammar Gaddafi and overthrew his government.⁹ The uprising continued to spread and has impacted Syria, Yemen, and Bahrain.¹⁰

This article will focus on Libya, Egypt, and Syria, three countries affected by the Arab Spring that represent various levels of involvement in the international system for dispute resolution. First, the article will explore the recent history of the target countries and foreign investment in the region. The next section will focus on the governments prior to the change in political power and the rash of nationalization that characterized the era dominated by Arab Socialism. The potential future for the target countries will also be addressed, with a focus on some of the factors that drove the Arab Spring in its initial stages and the factors that might cause future disputes with international investors. Next, the article will look at the level and nature of involvement the target countries have in the international investment legal regime, with a focus on Bilateral Investment Treaties, or

⁶ CBS NEWS, *supra* note 4.

⁷ Ishaan Tharoor, *The Arab Spring Blooms in Tunisia and Egypt*, TIME (Dec. 7, 2011), http://www.time.com/time/specials/packages/article/0,28804,2101344_2101368_2101659,00.html.

⁸ *Id.*

⁹ Colin Warbrick, *I. British Policy and the National Transitional Council of Libya*, 61 INT'L & COMP. L.Q. 247, 247 (2012).

¹⁰ Aaron David Miller, *For America, An Arab Winter*, WILSON Q., Summer 2011, at 36, 36. As of early 2013, the Syrian government of President Bashar Assad had not toppled, however the government is facing pressure for shelling the town of Homs. Zeina Karam, *Syrian Forces Shell Homs as Crisis in City Deepens*, THE INDEPENDENT (Feb. 23, 2012, 2:59 PM GMT). Senators John McCain, Lindsay Graham, and Joe Lieberman have called for United States military intervention similar to the Libya mission in Syria. Chris McGreal, *Pentagon Draws up "Internal Review" as US Searches for Way to Stop Syria Killing*, THE GUARDIAN (Feb. 8, 2012, 1:55 PM). Syria President Assad has also lost the support of former allies in Hamas, a Palestinian Islamist group. Fares Akram, *In Break, Hamas Supports Syrian Opposition*, N.Y. TIMES, Feb. 24, 2012, at A4. However, Russia and China do not have the same level of enthusiasm as the West on the topic for support for the Syrian opposition movement. *Russia, China Veto UN Resolution Against Syria*, CBS NEWS (Feb. 4, 2012, 12:53 PM), http://www.cbsnews.com/8301-202_162-57371608/russia-china-veto-un-resolution-against-syria/; *Russia and China Veto Resolution on Syria at UN*, BBC NEWS (Feb. 4, 2012, 4:44 PM), <http://www.bbc.co.uk/news/world-16890107>.

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BITs. The article will continue by examining the potential avenues of recourse international investors may have in the absence of a BIT, particularly the domestic law in the target countries and the legal principle of *pacta sunt servanda*.

II. THE STATE OF INVESTMENT IN THE ARAB SPRING COUNTRIES

The post Cold War world has seen a boom in foreign direct investment spending in the developing world.¹¹ In the year 2000, Middle Eastern and North African countries consisting of Algeria, Djibouti, Egypt, Iran, Jordan, Lebanon, Morocco, Syria, Tunisia, and Yemen received \$2.2 billion in foreign direct investment.¹² There has been a large increase in foreign direct investment in the years since 2000.¹³ The Egyptian Ministry of Investment claims foreign direct investment into Egypt alone rose from \$2 billion to \$13.2 billion in a span of four years from 2004 to 2008.¹⁴

Historically, natural resources, particularly energy resources like oil, attracted foreign investors and played a large economic role in the Middle East.¹⁵ Natural resources are just as important to the economies of the Middle East and North Africa today.¹⁶ The Middle East and North Africa possess around fifty- nine and one half percent of the world's proven oil reserves.¹⁷

¹¹ Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639, 640 (1998). Foreign direct investment increased "from \$13 billion in 1987 . . . to \$90.3 billion in 1995." *Id.*

¹² Farrukh Iqbal & Mustapha Kamel Nabli, Prepared for the Middle East and North African Region: The Challenges of Growth and Globalization Conference (Apr. 7-8, 2004), available at <http://siteresources.worldbank.org/INTMENA/Resources/tradefdivdev.pdf>.

¹³ See Alexander Bohmer, OECD Private Sector Development Division, Address at the 4th Meeting of Working Group 1 and 2 MENA-OECD Investment Programme (Oct. 28, 2008), available at <http://www.oecd.org/dataoecd/31/29/41613433.pdf>. The Middle East, North African, and Gulf state region saw foreign direct investment quadruple. *Id.*

¹⁴ *Investment*, MINISTRY OF INVESTMENT, EGYPT, <http://www.investment.gov.eg/en/Investment/Pages/default.aspx> (last visited Mar. 30, 2012).

¹⁵ *What Role Have Natural Resources Played in the Politics and Economy of the Middle East?*, PUBLIC BROADCASTING COMPANY, <http://www.pbs.org/wgbh/globalconnections/mideast/questions/resource/index.html>.

¹⁶ Not only do "abundant petroleum fields dominate the area's economy," but the demand for oil, largely driven by a desire to sustain Western military power and domestic lifestyles, will increase as countries like China and India continue to develop into the future. *Id.*

¹⁷ BP, BP STATISTICAL REVIEW OF WORLD ENERGY JUNE 2011 6 (2011), available at http://www.bp.com/liveassets/bp_internet/globalbp/globalbp_uk_english/reports_and_pu

The region also produces almost thirty-six percent of the world's oil, while consuming very little of it.¹⁸ The region also possesses large amounts of another important energy resource—natural gas.¹⁹ The Middle East, including Egypt and Libya, combine to possess forty two and one half percent of the world's proven natural gas reserves.²⁰ The procurement of natural resources often requires high levels of foreign investment, and may serve as an area of future investment disputes between Middle Eastern reformers, anti-developed world policymakers, and international investors.²¹

The imbalance created by large amounts of production combined with sparse domestic consumption makes oil one of the chief exports for Middle Eastern and North African countries.²² In Libya in 2011, oil revenues “contribute[d] about 95% of export earnings, 25% of GDP, and 80% of government revenue.”²³ Libya is a net oil exporter by a wide margin. In 2009, Libya exported an estimated 1.385 million bbl/day while importing an estimated 575 bbl/day.²⁴ The amount of oil Libya exported and imported per day in 2009 ranked eighteenth and 199th in the world respectively according to estimates made by the United States Central Intelligence Agency.²⁵ Libya produced an estimated 15.9 billion cubic meters of natural gas in 2010 with exports reaching an estimated 9.89 billion cubic meters, which ranked twenty-first in the world in that year.²⁶ For most of the last quarter of the twentieth century, the western world isolated Libya for its support of

blications/statistical_energy_review_2011/STAGING/local_assets/pdf/statistical_review_of_world_energy_full_report_2011.pdf.

¹⁸ *Id.* at 9.

¹⁹ *Id.* at 20.

²⁰ *Id.*

²¹ *Id.*

²² *The World Factbook: Libya*, CENTRAL INTELLIGENCE AGENCY (last visited Feb. 8, 2012), <https://www.cia.gov/library/publications/the-world-factbook/geos/ly.html> [hereinafter *World Factbook Libya*]; *The World Factbook: Egypt*, CENTRAL INTELLIGENCE AGENCY (last visited Feb. 21, 2012), <https://www.cia.gov/library/publications/the-world-factbook/geos/eg.html> [hereinafter *World Factbook Egypt*]; *The World Factbook: Syria*, CENTRAL INTELLIGENCE AGENCY (last visited Feb. 13, 2012), <https://www.cia.gov/library/publications/the-world-factbook/geos/sy.html> [hereinafter *World Factbook Syria*].

²³ *World Factbook Libya*, *supra* note 22.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

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terrorism; however the turn of the century saw the removal of sanctions on Libya and the return of foreign investors.²⁷

Oil plays relatively less of a role in Egypt, as it has recently become a net oil importer.²⁸ In 2010, Egypt produced an estimated 662,600 bbl/day, which ranked twenty-ninth in the world, and consumed an estimated 740,000 bbl/day, which ranked twenty-fifth.²⁹ Although Egypt is a net oil importer and it ranked fifty-eighth in the world in oil exports in 2009, oil and crude products remain one of its chief exports.³⁰

The need for imported oil encouraged the Egyptian government to create a more open environment for foreign parties and investment in the industry.³¹ The Minister of Petroleum in Egypt claimed \$7 billion dollars in foreign investment were “geared” for the fiscal year 2011/2012.³² Egypt saw a new high in proven oil reserves in 2009 and 2010, with the amount only expected to rise.³³ In addition to oil, Egypt produced an estimated 62.69 billion cubic meters of natural gas in 2009, with exports reaching 18.32 billion cubic meters, which ranked thirteenth in the world.³⁴

Syria, with about a quarter of the population of Egypt, ranked forty-sixth in the world in oil exports in 2010 while importing only a small amount of crude oil.³⁵ Like Egypt, crude oil and petroleum products are among Syria’s leading exports.³⁶ The Syrian government recently awarded contracts for exploration of existing oil fields to Shell Oil and TOTAL, a French

²⁷ Stanley Reed, *Going For a Gusher in Libya*, BLOOMBERG BUSINESSWEEK (Mar. 25, 2007), http://www.businessweek.com/magazine/content/07_13/b4027055.htm; Stanley Reed, *BP Snares Huge Libyan Gas Fields*, BLOOMBERG BUSINESSWEEK (May 30, 2007), <http://www.businessweek.com/stories/2007-05-30/bp-snares-huge-libyan-gas-fieldsbusinessweek-business-news-stock-market-and-financial-advice>.

²⁸ Colin Barr, *How Egypt Spells Oil Spike*, CNN MONEY (Jan. 31, 2011), <http://finance.fortune.cnn.com/2011/01/31/how-egypt-spells-oil-spike/>.

²⁹ *World Factbook Egypt*, *supra* note 22.

³⁰ *Id.*

³¹ Marin Katusa, *Unconventional Oil In The Middle East*, FORBES (Jan. 13, 2011, 5:00 PM), <http://www.forbes.com/sites/energysource/2011/01/13/unconventional-oil-in-the-middle-east/>.

³² *USD 7bn in Foreign Oil Investments—Minister*, EGYPTIAN STATE INFORMATION SERVICE (Feb. 11, 2012), <http://www.us.sis.gov.eg/En/Story.aspx?sid=60383>.

³³ Amro Hassan, *EGYPT: Oil and Gas Reserves Reach Highest Levels Ever*, LOS ANGELES TIMES (Aug. 16, 2010, 10:13 AM), <http://latimesblogs.latimes.com/babylonbeyond/2010/08/egypt-oil-and-gas-reserves-record-highest-ever-figures-.html>.

³⁴ *World Factbook Egypt*, *supra* note 22.

³⁵ *World Factbook Syria*, *supra* note 22.

³⁶ *Id.*

multinational oil company.³⁷ Unlike Egypt, Syria produces little natural gas, an estimated 6.19 billion cubic meters in 2009, which is not included among its chief exports.³⁸

III. THE PAST AND POTENTIAL FUTURE OF RULING REGIMES IN THE TARGET COUNTRIES

A. *Governments Prior to Changes in Political Power*

While the ultimate future of the Arab Spring countries, which will be discussed in greater detail in the next section, is still undecided, the past is much clearer. The former regimes in Libya and Egypt, as well as the current regime in Syria, were once leaders of an ideological revolution³⁹ that led to the rise of Arab Socialism.⁴⁰ Arab Socialism, which arose out of pressures caused by a history of colonialism in the region and modernization,⁴¹ was a blend of Arab nationalism and socialism as an economic theory of development.⁴² At the forefront of Arab Socialism were Gamal Abdel Nasser of Egypt and the Ba'th Party in Syria and Iraq. Nasser used Egypt's status as the "Arab world's cultural, political, and military leader" to take an especially large role in the development and proliferation of Arab Socialism.⁴³

As the leader of the Free Officer movement, Nasser overthrew the Egyptian monarchy in 1952 and established a one party socialist government

³⁷ Katusa, *supra* note 31. Shell and TOTAL, along with Exxon, BP, and Chevron, are the largest oil companies in the world and are referred to as supermajors. Tom Bergin, *Oil Majors' Output Growth Hinges on Strategy Shift*, REUTERS (Aug. 1, 2008, 10:26 AM), <http://www.reuters.com/article/2008/08/01/us-oilmajors-production-idUSL169721220080801>.

³⁸ *World Factbook Syria*, *supra* note 22.

³⁹ Egypt, Syria, and Libya were part of a federation in the early 1970s. Z.Y. HERSHLAG, *THE ECONOMIC STRUCTURE OF THE MIDDLE EAST* 5 (1975).

⁴⁰ Arab Socialism can be described as "a pragmatic national and economic device that employs mixed Koranic and Marxist slogans, neither of which are closely related to prevailing policies and realities in the Arab nations." HERSHLAG, *supra* note 39, at 2.

⁴¹ *Id.*

⁴² In a way differing from more traditional ideas of socialism, "[a]rab socialism . . . seems to be interpreted by the respective constitutions and by Arab leadership mainly in terms of national (i.e. public or governmental) rather than social ownership, and of accelerated economic growth." *Id.* at 56.

⁴³ KENNETH M. POLLACK ET AL., *THE ARAB AWAKENING: AMERICA AND THE TRANSFORMATION OF THE MIDDLE EAST* 102 (2011).

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two years later.⁴⁴ Although Nasser collaborated with the Islamist Muslim Brotherhood,⁴⁵ he was a secular nationalist with a vision that conflicted with the spiritually driven objectives of the Brotherhood.⁴⁶ The policies pursued by Nasser, which became known as Nasserism, included the socialist hallmarks of nationalization and state participation in industry. The transformation of Egypt under Nasser took place with a series of decrees issued between July 19th and 23rd of 1961, eliminating the preexisting system of private ownership in favor of a socialist system.⁴⁷ As a result of the decrees, the private sector controlled only twenty percent of Egyptian industry in 1963.⁴⁸

With the death of Nasser, Anwar al-Sadat assumed the presidency and struck a political deal with the Muslim Brotherhood, allowing the party more freedom in exchange “for their support against the Nasserites and the leftists.”⁴⁹ In addition to his deal with the Muslim Brotherhood, al-Sadat allowed opposition parties to develop in small numbers in 1976, chipping away at the one party system under Nasser.⁵⁰ In addition to political reform, Sadat set Egypt on a slow journey towards economic liberalization.⁵¹ Liberalization continued under al-Sadat’s successor President Mubarak. Reformers decried the privatization under President Mubarak as crony capitalism. The continued charges of crony capitalism could lead to a push back against privatization by the new government and the renegotiation of concessions and other economic agreements struck under President Mubarak.⁵²

⁴⁴ MARINA OTTAWAY & AMR HAMZAWY, *GETTING TO PLURALISM* 48 (2009).

⁴⁵ It is important to note that the term “Islamist,” used frequently throughout this article, refers to those with a particularly orthodox view of Islam and its role in government, not Islam or Muslims generally.

⁴⁶ LAWRENCE WRIGHT, *THE LOOMING TOWER: AL-QAEDA AND THE ROAD TO 9/11* 27 (2006).

⁴⁷ Malcolm H. Kerr, *The Emergence of a Socialist Ideology in Egypt*, 16 *THE MIDDLE EAST JOURNAL* 127, 127 (1962).

⁴⁸ Peter Johnson, *Egypt Under Nasser*, 10 *MERIP REPORTS* 3, 7 (1972).

⁴⁹ WRIGHT, *supra* note 46, at 39.

⁵⁰ OTTAWAY & HAMZAWY, *supra* note 44, at 48. The policy of allowing some political opposition came to a halt when “Sadat dissolved all religious student associations, confiscated their property, and shut down their summer camps” in response to demonstrations against Sadat’s decision to make peace with Israel and allow women the right to divorce. WRIGHT, *supra* note 46, at 49.

⁵¹ OTTAWAY & HAMZAWY, *supra* note 44, at 51.

⁵² Salwa Ismail, *A Private Estate called Egypt*, *THE GUARDIAN* (Feb. 6, 2011, 2:00 PM), <http://www.guardian.co.uk/commentisfree/2011/feb/06/private-estate-egypt-mubarak-cronies>.

The Free Officers of Nasser and Egypt can trace their political ideology partly to the Syrian Ba'th Party.⁵³ The Syrian Ba'th Party had a coherent socialist theory dating back to 1946, with "[t]he Baath Constitution call[ing] for the redistribution of land holdings among the citizens on a just basis, [and] for the nationalisation of utilities and large industries[.]"⁵⁴ The countries of Syria and Egypt were extremely close during the beginning of Nasser's rise to power, with a union between the two forming in 1958.⁵⁵ After the Egypt-Syria union failed, the Ba'th Party seized power in Syria in March of 1963.⁵⁶ The Syrian Constitution reflects some of the similarities with their former partner, "closely follow[ing] the Egyptian concept by admitting three forms of ownership of means of production; 1. State (or national); 2. Collective (by producers organized in association and co-operatives); 3. Private (which should not contradict public interests but should be defended against arbitrary expropriation)."⁵⁷ Just like Egypt, Syria undertook efforts to liberalize their economic structure in recent years.⁵⁸ As of early 2013, the government of President Bashar al-Assad is still in power in Syria; however, protests, defections from the army, and an ongoing civil war have threatened the current regime and may lead to a seismic change, or even the complete overthrow, of his government in the near future.⁵⁹

In Libya, Colonel Muammar Gaddafi, with the help of the Free Unionist Officers, came to power in 1969 by overthrowing the pro-United States regime of King Idris.⁶⁰ Libya under Gaddafi often had an extremely rocky relationship with the West, particularly the United States. The United States designation of Libya as a "state sponsor of terrorism" in 1979 resulted in further conflict between the two countries through the 1980s.⁶¹ Libya would,

⁵³ Hamid Enayat, *Islam and Socialism in Egypt*, 4 MIDDLE EASTERN STUDIES 141, 142 (1968).

⁵⁴ SAID, *supra* note 1, at 65–66.

⁵⁵ *Id.* at 34.

⁵⁶ RADWAN ZIADEH, POWER AND POLICY IN SYRIA: INTELLIGENCE SERVICES, FOREIGN RELATIONS AND DEMOCRACY IN THE MODERN MIDDLE EAST 2 (2010).

⁵⁷ HERSHLAG, *supra* note 39, at 66.

⁵⁸ *Id.*

⁵⁹ See generally Syria — Uprisings and Civil War, N.Y. TIMES (last visited Feb. 8 2012), <http://topics.nytimes.com/top/news/international/countriesandterritories/syria/index.html>.

⁶⁰ Lisa Anderson, *Rogue Libya's Long Road*, 241 MIDDLE EAST REPORT 42, 42 (2006); Ronald Bruce St. John, *The Changing Libyan Economy: Causes and Consequences*, 62 MIDDLE EAST J. 75, 76 (2008).

⁶¹ Anderson, *supra* note 60, at 43.

however, eventually partially repair its relationship with the West and, until the recent turmoil, had a rather tranquil relationship with the United States.⁶²

The confrontational style of Libyan leader Gaddafi created complications not only with Western powers, but with the oil industry as well. Gaddafi used nationalization of oil concessions as both a political protest and a negotiating tool in hopes of achieving direct equity participation.⁶³ Reforms labeled the “Revolution within the Revolution” began to liberalize the economic system in 1987; however, these reforms did not affect the petroleum industry.⁶⁴ The petroleum sector would eventually see reform. By the first decade of the 21st Century, a number of foreign oil companies—including BP, one of the companies with assets nationalized by Gaddafi in the 1970s—returned to Libya.⁶⁵

The early wave of nationalization and conflict with private industry in Libya led to a number of high profile arbitration cases.⁶⁶ The nationalization efforts often conflicted with stabilization clauses found in the laws used to establish procedures for awarding concessions to foreign companies.⁶⁷ The conflicts led to arbitration by way of choice of law provisions.⁶⁸ The arbitrators came to different conclusions in the Libyan nationalization cases, but those differing conclusions tended to favor the international investors.⁶⁹

B. *Potential Future Governments and the Factors Driving the Restructuring of Government*

The timing of the revolutions and unrest in Libya, Egypt, and Syria share an interesting commonality. All three situations occurred after liberalizing

⁶² The voluntary dismantling of the Libyan weapons of mass destruction (WMD) program as well as support for the United States against al-Qaeda helped lead to the improvement in relations. Lisa Anderson, *Rogue Libya's Long Road*, 241 MIDDLE EAST REPORT 42, 45 (2006).

⁶³ Robert B. von Mehren & P. Nicholas Kourides, *International Arbitrations between States and Foreign Private Parties: The Libyan Nationalization Cases*, 75 AM. J. INT'L L. 476, 483–84 (1981); St. John, *supra* note 60, at 76.

⁶⁴ St. John, *supra* note 60, at 78.

⁶⁵ *Id.* at 86.

⁶⁶ Jason Webb Yackee, *Pacta Sunt Servanda And State Promises to Foreign Investors Before Bilateral Investment Treaties: Myth and Reality*, 32 FORDHAM INT'L L. J. 1550, 1584 (2009).

⁶⁷ Mehren & Kourides, *supra* note 63, at 479.

⁶⁸ *Id.* at 481.

⁶⁹ Margarita T.B. Coale, *Stabilization Clauses in International Petroleum Transactions*, 30 DENV. J. INT'L L. & POL'Y 217, 231 (2002).

reforms made the target countries' economies more open and privatized. While the timing is most likely a coincidence and not a direct cause of unrest, it may have an impact on how a new government might handle economic issues.

Corruption is one of the important factors driving the unlikely coalition of protesters in Arab Spring countries.⁷⁰ Corruption is cited as a motivation by protesters and their concerns are evident by the number of money laundering and corruption charges levied against the former regimes in Egypt and Tunisia.⁷¹ Many of the charges of corruption, especially in Egypt, stem from recent privatization efforts, with charges that President Mubarak fostered the growth of crony capitalism.⁷² In countries like Libya, with extremely large oil revenues available for possible graft, probes into oil concessions may result in changes to those concessions by the new regime. In fact, probes into oil deals in Libya and a lawsuit related to corruption in Egyptian privatization have already begun.⁷³ Reformers can also use

⁷⁰ Stuart Levey, *Fighting Corruption After the Arab Spring*, FOREIGN AFFAIRS June 16, 2011, <http://www.foreignaffairs.com/articles/67895/stuart-levey/fighting-corruption-after-the-arab-spring>.

⁷¹ *Id.*

⁷² Ismail, *supra* note 52. David D. Kirkpatrick & Dina Salah Amer, *Egypt's Economy Slows to a Crawl; Revolt is Tested*, N.Y. TIMES, June 9, 2011, <http://www.nytimes.com/2011/06/10/world/middleeast/10egypt.html?pagewanted=all>; James V. Grimaldi & Robert O'Harrow Jr., *In Egypt, Corruption Cases Had an American Root*, THE WASHINGTON POST (Oct. 19, 2011), http://www.washingtonpost.com/investigations/in-egypt-corruption-had-an-american-root/2011/10/07/gIQAAPWoyL_story.html; JEREMY M. SHARP, CONG. RES. SERV., RL 33003, EGYPT IN TRANSITION (2011).

⁷³ The Libyan National Transition Council has promised to analyze existing oil contracts consummated under the Gaddafi regime. Benoit Faucon, *Libya May Revise Foreign Oil, Gas Deals*, MARKET WATCH (Sept. 18, 2011, 11:44 AM), <http://www.marketwatch.com/story/libya-may-revise-foreign-oil-gas-deals-2011-09-18>; *Libya to Probe Gaddafi-era Oil Deals*, EGYPT.COM (Oct. 11, 2011, 8:02 PM), <http://news.egypt.com/english/permalink/54946.html>. The reviews by the Council may be used to encourage oil companies to help in the rebuilding effort, or to "punish companies from Russia or China, whose governments did not support the uprising." *UPDATE 2-Libya Hits ENI but Oil Deals Seem Safe*, REUTERS (Dec. 29, 2011), <http://www.reuters.com/article/2011/12/29/libya-eni-idUSL6E7NT3GZ20111229>. For more on Egyptian corruption, see *Lawsuit Demanding Investigation of Corrupt Privatization Deals*, EGYPT INDEPENDENT (Jan. 8, 2012, 5:57 PM), <http://www.almasryalyoum.com/en/node/590911>.

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Nationalization as a political tool, as it was in the previous Libyan nationalization cases.⁷⁴

The disenchantment with government, especially the charges of corruption in the Arab Spring countries, notably Libya and Egypt, signals potential conflict between international investors and the new governments. Although Arab Socialism seems to be on the way out in the Arab Spring countries, nationalization and other similar contract adjustments might be seen as a necessary push back on the crony capitalism practiced by the former regimes. If agreements cannot be arranged between the states and the affected international investors to manage the potential changes, arbitration will likely play an important role.

The protests that toppled the government of President Mubarak were wide ranging, with an estimated six million Egyptians, ranging from young liberals to Islamists, participating. The Egyptian experience is reflective of experiences throughout the region. Outside of grievances on more general issues such as corruption, the Arab Spring does not seem to have an established political ideology to rally behind.⁷⁵ Instead, the Arab Spring protestors seem to be driven solely by opposition to ruling parties, rallying behind general ideas such as “dignity and freedom.”⁷⁶ A recent poll taken in Egypt found sixty-four percent of respondents would prefer a “democratic system of government” while one percent of respondents support the cleric dominated Iranian model.⁷⁷ Although support for the Iranian model of

⁷⁴ Mehren & Kourides, *supra* note 63, at 484. Egyptians have shown increasing levels of anti-American populism, where “[m]ore than 70% of Egyptians, according to a recent Gallup poll, no longer want U.S. funding. David Schenker, *Egypt’s Cold Shoulder*, L.A. TIMES (Feb. 15, 2012), <http://articles.latimes.com/2012/feb/15/opinion/la-oe-schenker-egypt-20120215>. A potential battle looms between the United States and Egypt over the continuation of Egypt’s treaty with Israel as well. David D. Kirkpatrick, *Egyptian Party Threatens to Review Treaty with Israel*, N.Y. TIMES, Feb. 16, 2012, at F12.

⁷⁵ POLLACK ET AL., *supra* note 43.

⁷⁶ *Id.*

⁷⁷ *Id.* at 18. In Iran, “[t]he Shi’[a] ulama . . . with the Islamic Revolution beginning in 1979 . . . became the government itself.” L. CARL BROWN, RELIGION AND STATE: THE MUSLIM APPROACH TO POLITICS 42 (2000). The ulama are “religious specialists with some authority (even if ill-defined and less than total) over the faith and the faithful . . . comparable to the Jewish rabbinate.” *Id.* at 29. While Egypt is a majority Sunni Muslim country, rival Shi’a Muslims make up the majority in Iran. Susan Palk, *Explainer: Tensions Between Sunnis and Shiites*, CNN WORLD (Feb. 23, 2011), http://articles.cnn.com/2011-02-23/world/bahrain.sunni.shiite.explainer_1_shiite-majority-sunni-arab-leaders-gulf-island-state?_s=PM:WORLD. For more information about the Sunni and Shi’a rivalry dating back to the 7th Century, see Jeffrey Goldberg, *How Iran Could Save the Middle East*, THE ATLANTIC (July/Aug. 2009), available at

Islamic governance in Egypt appears weak, the idea of a completely secular government is unpopular, with “69 percent [of respondents] believ[ing] religious leaders should advise those in authority.”⁷⁸

One of the more organized parties, the Muslim Brotherhood, is expected to play a large role in the new Egyptian government. The Muslim Brotherhood, founded in 1928 by Hasan al-Banna, is an Islamist political movement that embraced the idea of an “Islamic State” in Egypt.⁷⁹ In more recent years, the Muslim Brotherhood adapted a less radical stance on government, “accepting the legitimacy of the individual modern states[,] . . . the idea of participation in the political space[,]” and “the right to participation of parties and movements with different ideological commitments and goals;” however, their Islamist roots remain strong as an underlying ideology.⁸⁰

The Muslim Brotherhood has seen a number of political victories in Egypt. In a final round of parliamentary elections held on January 3, 2012,⁸¹ the Muslim Brotherhood “won about 45% of the People’s Assembly’s seats” with “[t]he Islamic conservative Salafi party Al Nour” in second “claiming more than 20% of the seats.”⁸² Observers expected the secretary-general of the Muslim Brotherhood, Mohamed Saad Katatni, to become the speaker of the Egyptian parliament,⁸³ however the Egyptian Supreme Constitutional Court, composed of members appointed by the former regime, further unsettled the political conflict by dissolving it.⁸⁴ Despite the Court’s blow to

<http://www.theatlantic.com/magazine/archive/2009/07/how-iran-could-save-the-middle-east/7502/1/>.

⁷⁸ POLLACK ET AL., *supra* note 43, at 18. Sunni Islam “rejects clerical hierarchy or centralizing procedures for establishing doctrine and law,” however their “political experience is . . . more like the Christian West - a religious establishment with close ties to government with both claiming to represent the majority population.” BROWN, *supra* note 77, at 37.

⁷⁹ WRIGHT, *supra* note 46, at 16.

⁸⁰ OTTAWAY & HAMZAWY, *supra* note 44, at 70.

⁸¹ David D. Kirkpatrick, *Egyptians Vote in Final Round of Parliamentary Elections*, N.Y. TIMES, Jan. 4, 2012, at F1.

⁸² Amro Hassan, *Muslim Brotherhood Party Official Tapped for Egypt’s Parliament Speaker*, LOS ANGELES TIMES (Jan. 17, 2012, 10:19 AM), http://latimesblogs.latimes.com/world_now/2012/01/islamists-brotherhood-leader-parliament-speaker.html.

⁸³ *Id.*

⁸⁴ See David D. Kirkpatrick, *Blow to Transition as Court Dissolves Egypt’s Parliament*, N.Y. TIMES (June 14, 2012), <http://www.nytimes.com/2012/06/15/world/middleeast/new-political-showdown-in-egypt-as-court-invalidates-parliament.html?pagewanted=all>.

the Muslim Brotherhood in the Egyptian Parliament, the Brotherhood-backed candidate, Mohamed Morsi, defeated former Prime Minister Ahmed Shafik in an election for president of Egypt.⁸⁵ The situation around Parliament and the election of a president did little to stem the brewing turmoil between the Egyptian Army and the Muslim Brotherhood. The Egyptian Army has seemingly been reluctant to yield any power to the civilian parties especially in relation to the writing of a new constitution, claiming the results of the overturned elections were not representative of the true will of the Egyptian public.⁸⁶

It is clear that liberal leaning parties did not fare well in the most recent election. The weakness of the liberal leaning and leftist secular parties is not surprising as “they continue[d] to do very little in terms of constituency-building and grassroots mobilization” in the years leading up to the ouster of President Mubarak.⁸⁷ The absence of strong liberal and leftist secular parties guarantees that either the Muslim Brotherhood or the Egyptian Army will control any new government that emerges as a result of the ouster of President Mubarak.

The Muslim Brotherhood, despite its healthy margins in parliamentary elections and a victory in the presidential election, has avoided conflict with the military and supported the military council’s appointed cabinet and interim prime minister.⁸⁸ The decision to work with the military caretakers reinforces the notion that the Muslim Brotherhood has indeed come a long way since the days of Sayyid Qutb, by embracing a more pragmatic approach to domestic politics.⁸⁹ A more pragmatic Muslim Brotherhood suggests

⁸⁵ See David D. Kirkpatrick, *Named Egypt’s Winner, Islamist Makes History*, N.Y. TIMES, June 24, 2012, at F1. See also Ian Black, *Deft but Ruthless, President Touches Some Raw Nerves: Profile: Mohamed Morsi*, THE GUARDIAN, Nov. 24, 2012, at N35.

⁸⁶ David D. Kirkpatrick, *Military Flexes Its Muscles as Islamists Gain in Egypt*, N.Y. TIMES, December 8, 2011, at F6.

⁸⁷ OTTAWAY & HAMZAWY, *supra* note 44, at 52. The inability for liberal parties to organize may be the result of “the challenge of making their message about democracy, civil freedoms, and human rights concrete enough to be relevant to broad constituencies.” *Id.* at 4.

⁸⁸ David D. Kirkpatrick, *Islamists in Egypt Back Timing of Military Handover*, N.Y. TIMES (Jan. 8, 2012). Secular critics have complained that “in exchange for a free hand in the legislature, it is rumored, the Brothers have quietly agreed to extend the long lease of Egypt’s military-backed ‘deep state’.” *A Long March*, THE ECONOMIST (Feb. 18, 2012), <http://www.economist.com/node/21547853>.

⁸⁹ Qutb was an influential and famous leader of the Muslim Brotherhood. BROWN, *supra* note 77, at 146. Qutb believed Islam could never allow for “[s]eparation of the sacred and the secular, state and religion, science and theology, mind and spirit.” WRIGHT, *supra* note 46, at 24.

conflicts with international investors and companies may not be inevitable; however, the likelihood for conflict will continue to exist throughout the region.

The first round of elections in Libya had a slightly different outcome from the political situation in Egypt. After the fall of Gaddafi, a transitional government began to manage the formation of a new government.⁹⁰ The transitional government released a draft election law for establishing “a 200-person legislative body.”⁹¹ Elections were held on July 7, 2012 and led to a surprising defeat for the Muslim Brotherhood, with the moderate National Forces Alliance taking thirty-nine seats to the Brotherhood’s seventeen.⁹² Although the National Forces Alliance is more moderate than the Muslim Brotherhood and the more extreme Islamist party, they still advocate for Islam-influenced laws.⁹³

The situation in Syria is closer to the Libyan experience. Like Gaddafi, the Syrian government does not tolerate opposition parties, including the Muslim Brotherhood.⁹⁴ Therefore, like Libya, the Muslim Brotherhood’s extensive organization network is better suited for an underground resistance and not a conventional political campaign.⁹⁵ Because of the nature of the Muslim Brotherhood in Syria, large political victories like the ones

⁹⁰ Clifford Krauss, *A Capital Transforms, for Better and for Worse*, N.Y. TIMES, Nov. 28, 2011, at F14.

⁹¹ Margaret Coker, *Libya’s Draft Election Law Sparks Debates*, WALL ST. J., Jan. 3, 2012, at A10. The draft proposal was the subject of protests for being “prepared without consultation or public oversight and that its winner-take-all rules would encourage Libyans to vote along tribal lines or for rich or prominent citizens in their region, and undercut those seeking to form new parties.” Liam Stack, *Libya Protests Spur Shake-Up in Interim Government*, N.Y. TIMES (Jan. 22, 2012), <http://www.nytimes.com/2012/01/23/world/africa/protests-shake-libyas-interim-government.html?pagewanted=all>.

⁹² *Libya Election Success For Secularist Jibril’s Bloc*, BBC (July 18, 2012), <http://www.bbc.co.uk/news/world-africa-18880908>; Chris Stephen, *Mahmoud Jibril’s Centrist Party Dominates Libyan Election*, THE GUARDIAN (July 17, 2012), <http://www.guardian.co.uk/world/2012/jul/17/mahmoud-jibril-party-elections-libya>; David D. Kirpatrick, *Election Results in Libya Break an Islamist Wave*, N.Y. TIMES (July 8, 2012). Gaddafi’s suppression of Muslim Brotherhood and Libya’s tribal roots undercut the organizational advantage enjoyed by the Brotherhood in other Arab Spring countries. Abigail Hauslohner, *Why the Islamists Are Not Winning in Libya*, TIME (July, 10, 2012), <http://world.time.com/2012/07/10/why-the-islamists-are-not-winning-in-libya>.

⁹³ Hauslohner, *supra* note 92.

⁹⁴ OTTAWAY & HAMZAWY, *supra* note 44, at 28.

⁹⁵ Zvi Bar’el, *Whither Syria’s Muslim Brotherhood?*, HAARETZ (Sept. 12, 2012) <http://www.haaretz.com/news/features/whither-syria-s-muslim-brotherhood-1.464382>.

experienced in Egypt are unlikely; however, Islamists will have a large influence in any political power struggle.⁹⁶

The rise of the Muslim Brotherhood and other Islamist parties could mean a greater influence for Shari'a law in the domestic law of the targeted countries.⁹⁷ Shari'a, which means "the way to the watering place,"⁹⁸ is "the entire corpus of Muslim religious law."⁹⁹ Unlike Christianity, which traditionally distinguishes between the Church and the state,¹⁰⁰ Islam does not traditionally distinguish between the religious and the secular.¹⁰¹ To the Islamist participating in the political process, the idea of secular authority outside of religious law involves a tough balancing act of piety and pragmatism.¹⁰² Despite this balancing act, Islamist parties are extremely unlikely to completely abandon Shari'a law in favor of more secular standards, as this will cause them to lose an important constituency at the base of their support—devout Muslims.¹⁰³ At least one arbitral tribunal, in a case involving Libya, turned to Shari'a when deciding a foreign oil investment dispute: an occurrence which might be even more common if Shari'a gains a greater influence in the domestic law of the Arab Spring states.¹⁰⁴

Regardless of the ultimate outcome of the political struggle between politicians backed by military leaders and Islamists like the Muslim Brotherhood, there exists potential for conflict with international investors. Islamist parties could change existing investment laws to better reflect concepts of Shari'a law.¹⁰⁵ Once a strong ally, Egypt could see a backlash against Western investment, because United States aid has become very

⁹⁶ *Id.*

⁹⁷ OTTAWAY & HAMZAWY, *supra* note 44, at 72.

⁹⁸ BERNARD LEWIS, *THE POLITICAL LANGUAGE OF ISLAM* 19 (1988). A phrase made even more meaningful in the context of Islam's origin in desert geography. BROWN, *supra* note 77, at 25.

⁹⁹ BROWN, *supra* note 77, at 25.

¹⁰⁰ "In Christendom the existence of two authorities goes back to the founder, who enjoined his followers to render unto Caesar the things which are Caesar's and to God the things which are God's." LEWIS, *supra* note 98, at 2–3.

¹⁰¹ *Id.* at 2–3.

¹⁰² *Id.* at 3. Islamist parties that participate in the political process have de facto accepted the concept of the nation-state, as well as, in some cases, concepts of democratic process. OTTAWAY & HAMZAWY, *supra* note 44, at 74.

¹⁰³ OTTAWAY & HAMZAWY, *supra* note 44, at 74.

¹⁰⁴ Mehren & Kourides, *supra* note 62, at 517.

¹⁰⁵ OTTAWAY & HAMZAWY, *supra* note 44, at 74.

unpopular among the Egyptian population.¹⁰⁶ The two countries have also seen increased friction over Egypt's possible future commitment to a peace treaty with Israel, raising the opportunity to make a political point by altering or otherwise breaching existing foreign investment contracts.¹⁰⁷ New governments in Libya and Syria might be tempted to use alterations to existing foreign investment to punish countries, most notably Russia and China, who did not fully support their revolutions.¹⁰⁸ The Arab Spring countries may also be tempted to revisit or otherwise breach existing investment deals as a pushback on the corruption that angered the protestors prior to and during the revolutions.¹⁰⁹

IV. THE LEVEL OF INVOLVEMENT BY THE ARAB SPRING COUNTRIES IN EXISTING INTERNATIONAL INVESTMENT LEGAL REGIMES

The rise of the Bilateral Investment Treaty, or BIT, changed the international investment landscape that existed during the arbitration disputes of the Arab Socialism era.¹¹⁰ BITs debuted in the late 1950s, partially in response to a series of nationalizations and expropriations of oil assets and concessions in Libya and Iran, as well as the Suez Canal in Egypt.¹¹¹ The United States, relative latecomers to the BIT scene, began their program in 1977.¹¹² Egypt, one of the first states to negotiate a BIT with the United

¹⁰⁶ Ahmed Younis & Mohamed Younis, *Most Egyptians Oppose U.S. Economic Aid*, GALLUP (Feb. 6, 2012), <http://www.gallup.com/poll/152471/egyptians-oppose-economic-aid.aspx>.

¹⁰⁷ Kirkpatrick, *supra* note 72. *

¹⁰⁸ Michael Martina & Chris Buckley, *China Urges Libya to Protect Investments*, REUTERS (Aug. 23, 2011, 8:07 AM), <http://www.reuters.com/article/2011/08/23/us-china-libya-oil-idUSTRE77M0PD20110823>.

¹⁰⁹ See Maggie Hyde, *International Arbitration Plays Key Role in Gas Deal, Egypt's Future*, EGYPTIAN INDEPENDENT (Nov. 8, 2011, 5:02 PM), <http://www.egyptindependent.com/node/485459>.

¹¹⁰ MARGARET L. MOSES, *THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION*, Cambridge University Press, 222 (2008).

¹¹¹ Zachary Elkins, Andrew T. Guzman & Beth A. Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000*, 60 INT'L ORG. 811, 813 (2006).

¹¹² Kenneth J. Vandeveld, *U.S. Bilateral Investment Treaties: The Second Wave*, 14 MICH. J. INT'L L. 621, 625 (1993). Germany began the first BIT program in 1959. *Id.* The Charter of Economic Rights and Duties of States, adopted in 1974 by the U.N. General Assembly, pushed the creation of BIT programs because it "seemed not only to challenge the standard of prompt, adequate, and effective compensation [for expropriation], but to assume that there was no international minimum standard at all."

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States in 1982, saw their agreement with the United States go into force in 1993.¹¹³

One of the “basic aims” of the U.S. BIT program is “to protect investment abroad in countries where investor rights are not already protected through existing agreements (such as modern treaties of friendship, commerce, and navigation, or free trade agreements).”¹¹⁴ Among the “six core benefits” of a U.S. BIT are “clear limits on the expropriation of investments and [to] provide for payment of prompt, adequate, and effective compensation when expropriations take place.”¹¹⁵ The standard of “prompt, adequate, and effective compensation” found in the language of U.S. BITs related to expropriation cases is the same as the language found in a formula created by former U.S. Secretary of State Cordell Hull as a response to an oil industry nationalization by Mexico in 1938.¹¹⁶ While developed nations believe the Hull Formula represents the proper standard in expropriation cases, resistance from developing nations made finding a worldwide consensus on the issue difficult, if not impossible.¹¹⁷ In addition to the Hull Formula-inspired language related to compensation, the “six core benefits” of the U.S. BIT program also include “the right to submit an investment dispute with the government of the other party to international

Id. The UN General Assembly passed the 1974 Resolution, also known as CERDS, after dueling resolutions, one “using the notion of the term ‘permanent sovereignty over natural resources’” and another which “provided that nationalization measures could only be implemented for public purposes, security or national interest, subject to the investor receiving ‘appropriate compensation’ in accordance to domestic and international law.” Daniel E. Vieleville & Baiju Simal Vasani, *Sovereignty Over Natural Resources Versus Rights Under Investment Contracts: Which One Prevails?*, 5 TRANSNAT’L DISP. MGMT 1, 4 (2008).

¹¹³ Vandavelde, *supra* note 112, at 632.

¹¹⁴ *Bilateral Investment Treaties*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-agreements/bilateral-investment-treaties>. The protection of investment abroad is reflective not only of the developed investing states, but of “the growing interest of developing nations in receiving foreign investment by means of new projects or privatizations of already existing state-owned enterprises” which characterized the era during which BITs became popular. Vieleville & Vasani, *supra* note 112, at 2.

¹¹⁵ OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, *supra* note 114.

¹¹⁶ Patrick Dumberry, *Are BITs Representing the “New” Customary International Law in International Investment Law?*, 28 PENN ST. INT’L L. REV. 675, 677 (2010); Yackee, *supra* note 66, at 1559–60; Bernard Kishovian, *The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law*, 14 NW. J. INT’L L. & BUS. 327, 328 (1994); Guzman, *supra* note 11, at 644.

¹¹⁷ Dumberry, *supra* note 116, at 677–78.

arbitration . . . [with] no requirement to use that country's domestic courts."¹¹⁸

Although the United States has a BIT in force with Egypt, no such agreement exists with Libya or Syria.¹¹⁹ Egypt, Jordan, Morocco, Bahrain, and Tunisia represent the only North African and Middle Eastern countries with such an agreement with the United States.¹²⁰ Egypt has signed a relatively large number of BITs with both developed and undeveloped nations, including most of the West.¹²¹ In contrast to Egypt, Syria and Libya do not have an extensive network of BITs.¹²²

Syria and Egypt are signatories to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States,¹²³ which "set forth [the International Centre for Settlement of Investment Disputes]'s mandate, organization and core functions."¹²⁴ The ICSID serves "as an impartial forum providing facilities for the resolution of legal disputes between eligible parties, through conciliation or arbitration procedures."¹²⁵

¹¹⁸ OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, *supra* note 114. The core benefits reflect the fact that BIT programs were at least partially a response to "[t]he U.N. General Assembly's adoption in 1974 of the Charter of Economic Rights and Duties of States (CERDS), which had provided that compensation for expropriation was to be measured by the law of the expropriating State." Vandavelde, *supra* note 112, at 625.

¹¹⁹ *Bilateral Investment Treaties*, TRADE COMPLIANCE CENTER, http://tcc.export.gov/Trade_Agreements/Bilateral_Investment_Treaties/index.asp.

¹²⁰ *Id.*

¹²¹ *Bilateral Investment Treaties (BITs), Egypt*, WOLTERS KLUWER, <http://www.kluwerarbitration.com/BITs.aspx?country=Egypt>.

¹²² See *Total Number of Bilateral Investment Agreements concluded, 1 June 2011, Libyan Arab Jamahiriya*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, http://www.unctad.org/sections/dite_pcb/docs/bits_libya.pdf [hereinafter *Total BIT Libya*]; *Bilateral Investment Treaties (BITs), Syria*, WOLTERS KLUWER, <http://www.kluwerarbitration.com/BITs.aspx?country=Syria> [hereinafter WOLTERS KLUWER SYRIA].

¹²³ *List of Contracting States and Other Signatories of the Convention (as of July 25, 2012)*, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=S howDocument&language=English> [hereinafter ICSID CONVENTION]. Other parties to the Convention include Bahrain, Israel, Jordan, Kuwait, Qatar, Saudi Arabia, Turkey, United Arab Emirates, and Yemen. *Id.*

¹²⁴ *About ICSID*, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, <http://icsid.worldbank.org/ICSID/Index.jsp>.

¹²⁵ *Id.* The caseload of the ICSID reflected the growth of investment treaties with "twenty-one of twenty-six new cases registered with the Centre . . . based on bilateral and/or multilateral investment treaties" in fiscal year 2006. MOSES, *supra* note 110, at 222.

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Unlike Egypt and Syria, Libya is not a signatory of the convention and therefore is not a member state of the ICSID.¹²⁶ Although Libya is not a member state of the ICSID, it accepted, along with Egypt, the 1907 convention of the Permanent Court of Arbitration.¹²⁷ Syria has accepted neither the 1907 PCA convention nor the earlier 1899 PCA convention.¹²⁸

Egypt, Syria, and Libya provide three interesting and different situations in regards to their relationship with the United States and the rest of the developed world in the field of international investment. Egypt is a member state of the ICSID and has a BIT with the United States and most of the European powers.¹²⁹ Syria is a member state of the ICSID, but does not have a BIT with the United States.¹³⁰ Libya is not a member state of the ICSID nor does it have a BIT with the United States.¹³¹ The level of participation in the current international investment regime and the targeted country's

¹²⁶ ICSID CONVENTION, *supra* note 123.

¹²⁷ *Member States*, PERMANENT COURT OF ARBITRATION, http://www.pca-cpa.org/showpage.asp?pag_id=1038. The PCA was established to provide alternatives to war in the field of dispute resolution between states. MARK WESTON JANIS, *INTERNATIONAL LAW* 124 (5th ed. 2008). Although the PCA originally handled only interstate disputes, jurisdiction since expanded to include non-state private parties, like international investors and corporations. RUTH MACKENZIE, ET AL., *THE MANUAL ON INTERNATIONAL COURTS AND TRIBUNALS* 111 (2010). The Secretary-General of the PCA can be requested as the appointing authority under the 1976 United Nations Commission on International Trade Law (UNCITRAL) rules as well as the 2010 revision. See UNCITRAL ARBITRATION RULES art. 6 (1976), *available at* <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf>. See also UNCITRAL ARBITRATION RULES art. 6 (2010), *available at* <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf>.

¹²⁸ PERMANENT COURT OF ARBITRATION, *supra* note 127.

¹²⁹ ICSID CONVENTION, *supra* note 123; Egypt has concluded a relatively large number of bilateral investment treaties, not only with the United States and the major European powers, but China, Russia, other Asian and South American countries. *Total Number of Bilateral Investment Treaties concluded, 1 June 2012, Egypt*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, http://www.unctad.org/sections/dite_pcb/docs/bits_egypt.pdf.

¹³⁰ ICSID CONVENTION, *supra* note 123; Syria and the United States do have a signed treaty, but it is not in force. *Bilateral Investment Treaties (BITs), United States*, WOLTERS KLUWER, <http://www.kluwerarbitration.com/BITs.aspx?country=United%20States>. Syria does have BITs with China, Egypt, France, Germany, Italy, Spain, and Russia, among others. WOLTERS KLUWER SYRIA, *supra* note 122.

¹³¹ ICSID CONVENTION, *supra* note 123. Libya does, however, have a number of BITs in force with nations including Egypt, France, Germany, Spain, and Syria. *Total BIT Libya*, *supra* note 122. China, Iran, Russia, and Turkey have at least signed a BIT with Libya. *Id.*

engagement with the United States and the rest of the developed world should affect the likelihood of arbitration as a result of any economic restructuring and the potential outcome of that arbitration.

V. THE PROCESS, CHOICE OF LAW, AND THE ROLE OF *PACTA SUNT SERVANDA* IN THE POTENTIAL ARBITRATION DISPUTES

A. *Questions of Jurisdiction*

One of the goals of the BIT program is stability in international investment, mostly at the expense of domestic law in favor of international standards and arbitration.¹³² Article III of the agreement between the United States and Egypt states that “[c]ompensation shall be equivalent to the fair market value of the expropriated investment on the date of expropriation” in situations of expropriation and nationalization.¹³³ In the case of disputes that cannot be settled by consultation and negotiation within six months of the initiation of the dispute, “the national or company concerned may choose to submit the dispute to the International Centre for the Settlement of the Investment Disputes . . . for settlement by conciliation or binding arbitration” with “[e]ach Party hereby consent[ing] to the submission of an investment dispute to the Centre for settlement by conciliation or binding arbitration.”¹³⁴

The 2004 Model BIT for the United States, in language similar to that found in the Egyptian agreement, allows “a claimant [to] submit a claim . . . under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both the respondent and the non-disputing Party are parties to the ICSID Convention” after six months since

¹³² In the Letter of Transmittal associated with the U.S.-Egypt BIT, President Ronald Reagan stated, “the parties also agree to international law standards for expropriation and compensation . . . and procedures, including international arbitration, for the settlement of disputes.” *Egypt Bilateral Investment Treaty*, TRADE COMPLIANCE CENTER, http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_002813.asp [hereinafter *Egypt BIT*].

¹³³ *Egypt BIT*, *supra* note 132. The treaty allows for expropriation without triggering the agreement if it “(a) is done for a public purpose; (b) is accomplished under due process of law; (c) is not discriminatory; (d) is accompanied by prompt and adequate compensation, freely realizable; and (e) does not violate any specific contractual engagement.” *Id.* It has been accepted that “[s]tates have the right to nationalize their own natural resources but that the right is subject to the corresponding obligation to compensate the investor whose property is expropriated.” Vielleville & Vasani, *supra* note 112 at 11.

¹³⁴ *Egypt BIT*, *supra* note 132.

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the start of the dispute.¹³⁵ Provisions to arbitrate in BITs, like the one found in the Egypt-U.S. BIT and the U.S. Model BIT, are generally treated as irrevocable offers to investors governed by the treaty to enter into arbitration.¹³⁶ The Egyptian government did make a reservation to “maintain limited exceptions to the standard of national treatment otherwise required” in the field of natural resources.¹³⁷

If international, particularly American, investors find themselves in a conflict with Syria, arbitration may be much more difficult. While both Syria and the United States are both members of the ICSID, jurisdictional issues are more complicated without a BIT or other agreement in place.¹³⁸ For a dispute to be resolved by the ICSID, “both parties must have consented to arbitrate or conciliate pursuant to ICSID rules.”¹³⁹ In addition to the consent requirement, “one party must be a Contracting State, and the other party must be a national of a different Contracting State,” and “the dispute must be a legal dispute arising directly out of an investment.”¹⁴⁰ Unlike the situation with Egypt, the United States does not have a BIT with Syria, which provides a provision that qualifies as an irrevocable offer to arbitrate disputes.¹⁴¹ Unless an agreement with a clause providing for arbitration exists between Syria and the international investor, Syria would have to consent to any arbitration which may arise. Syrian consent may be difficult to obtain because, unlike Egypt, they do not have any concluded or pending cases in the ICSID database.¹⁴²

Arbitration may be even more difficult for international investors in the case of Libya. The United States does not have a BIT with Libya, nor is Libya a member of the ICSID.¹⁴³ International investors in China, a country

¹³⁵ *Treaty Between The Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment*, U.S. STATE DEPT. (2004), <http://www.state.gov/documents/organization/117601.pdf>.

¹³⁶ MOSES, *supra* note 110, at 223.

¹³⁷ *Egypt BIT*, *supra* note 132.

¹³⁸ ICSID CONVENTION, *supra* note 123. The Syrian deposit of instrument necessary for ratification occurred in 2006. Deposit of Instrument with the International Bank for Reconstruction and Development, Jan. 25, 2006, 2363 U.N.T.S. 435, *available at* <http://treaties.un.org/doc/Publication/UNTS/Volume%202363/v2363.pdf>.

¹³⁹ MOSES, *supra* note 110, at 222.

¹⁴⁰ *Id.*

¹⁴¹ TRADE COMPLIANCE CENTER, *supra* note 119.

¹⁴² *Search ICSID Cases*, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, <http://icsid.worldbank.org/ICSID/FrontServlet>.

¹⁴³ ICSID CONVENTION, *supra* note 123.

that resisted Western calls for military aid to the Libyan rebels,¹⁴⁴ find themselves in a similarly difficult situation until the BIT signed with Libya comes into force.¹⁴⁵ Libya has, as of 1996, accepted the 1907 Permanent Court of Arbitration (PCA) founding convention.¹⁴⁶ Russia, China, the United States, and most of the major European powers have accepted both the 1899 and 1907 PCA founding conventions.¹⁴⁷ It does not, however, appear any of Libya's treaties refer to the PCA.¹⁴⁸ If they are unable to rely on an international agreement, an inability likely based on the minimal level of Libyan involvement in the international dispute resolution system, companies and investors can turn to their contract with the Libyan government or local laws.¹⁴⁹

B. Choice of Law Issues

Once jurisdictional hurdles are cleared and the case reaches arbitration, a determination must be made to the standard of law which will be applied. The convention governing the ICSID first looks to any agreement made by

¹⁴⁴ Tania Branigan, *China looks to protect its assets in a post-Gaddafi Libya*, THE GUARDIAN (23 Aug. 2011), available at <http://www.guardian.co.uk/world/2011/aug/23/china-assets-post-gaddafi-libya?intcmp=239>; Michael J. Totten, *Libya's Rebels Unhappy with Russia and China*, COMMENTARY MAGAZINE (23 Aug. 2011), <http://www.commentarymagazine.com/2011/08/23/libya-rebels-russia-and-china/>.

¹⁴⁵ *Total BIT Libya*, *supra* note 122. France, Germany, Spain, and Switzerland do have a BIT in force with Libya. *Id.*

¹⁴⁶ PERMANENT COURT OF ARBITRATION, *supra* note 125. The PCA, founded in 1899, "provides services for the resolution of disputes involving various combinations of states, state entities, intergovernmental organizations, and private parties." *About Us*, PERMANENT COURT OF ARBITRATION, http://www.pca-cpa.org/showpage.asp?pag_id=1027.

¹⁴⁷ PERMANENT COURT OF ARBITRATION, *supra* note 125. Italy has only accepted the 1899 convention. *Id.*

¹⁴⁸ *Bilateral Investment Treaties*, PERMANENT COURT OF ARBITRATION, http://www.pca-cpa.org/showpage.asp?pag_id=1385; *Multilateral Investment Treaties*, PERMANENT COURT OF ARBITRATION, http://www.pca-cpa.org/showpage.asp?pag_id=1386; *Other Investment Instruments*, PERMANENT COURT OF ARBITRATION, http://www.pca-cpa.org/showpage.asp?pag_id=1391. Iran however, does reference the PCA in their Model BIT. *Other Investment Instruments*, PERMANENT COURT OF ARBITRATION, http://www.pca-cpa.org/showpage.asp?pag_id=1391.

¹⁴⁹ Oil concessions and other similar "concessions for the exploitation of natural resources are contracts that can be breached under international law." Vielleville & Vasani, *supra* note 112 at 10.

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the parties for the rule of law which will be applied.¹⁵⁰ If there is no agreement between the parties, “the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.”¹⁵¹ The U.S.-Egypt Treaty establishes international law as the governing law, which President Ronald Reagan described as “an important achievement for the BIT program and U.S. investment and international arbitration policies.”¹⁵² In the case of Syria, unless an agreement exists between the government and the adverse non-state party, the arbitration tribunal will apply Syrian law.¹⁵³ Any disputes in the Libyan case, and any other states with a low level of engagement in the international investment legal regime, will also have to rely on any agreements between the parties, Libyan domestic law, and potentially international law.

If a nation does not have a BIT with Egypt, its investors must turn either to their contract with Egypt, or Egyptian domestic law. Egypt does have a national law of arbitration.¹⁵⁴ The Egyptian national law of arbitration—The Egyptian Arbitration Act No. 27 of 1994—can be compared favorably to the UNCITRAL Model Law.¹⁵⁵ The Egyptian law allows the parties to agree to the standard of law that which will be applied.¹⁵⁶ If the parties cannot decide, the arbitral tribunal “shall apply the law, which it deems to be the most closely connected to the dispute.”¹⁵⁷

In 2008, Syria passed new arbitration legislation based on the 1976 UNCITRAL Model law.¹⁵⁸ Article 5 of The New Syrian Arbitration Act

¹⁵⁰ INT’L CTR. FOR SETTLEMENT OF INV. DISPUTES, ICSID CONVENTION, REGULATIONS AND RULES 23 (2003), available at https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc_en-archive/ICSID_English.pdf [hereinafter Investment Dispute Treaty].

¹⁵¹ *Id.*

¹⁵² *Egypt BIT*, *supra* note 132. Article VIII of the Treaty governs disputes in interpretation and application of the treaty. Article VIII provides that “upon the written request of either Party” the dispute shall “be submitted to an arbitral tribunal for binding decision in accordance with the applicable rules and principles of international law.” *Id.*

¹⁵³ Investment Dispute Treaty, *supra* note 150.

¹⁵⁴ Mohamed S. Abdel Wahab, *Commercial Arbitration, Egypt*, GLOBAL ARBITRATION REVIEW, <http://www.globalarbitrationreview.com/know-how/topics/61/jurisdictions/61/egypt/> (last visited Mar. 30, 2012).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ Mohammad Waleed Mansour, *Main Characteristics of the New Syrian Arbitration Law on Civil, Economic and Commercial Disputes*, 3 DIAC J. 34, 34 (Apr.–Dec. 2009), available at http://www.diac.ae/idias/journal/volume3sp2/mansour_eng4.pdf.

allows the parties to determine the law that will be applied.¹⁵⁹ Article 7 allows for arbitral agreements to be concluded both prior to and proceeding a dispute, but if the agreement is concluded after the dispute it “must determine the matters included in the arbitration, otherwise it shall be null and void.”¹⁶⁰ If a contract contains an arbitral clause, the clause is independent of the contract and will continue to be valid per se if the contract itself is ended.¹⁶¹ Article 38 of the Syrian Arbitration Law, which addresses the rules by which the arbitration shall be decided,¹⁶² allows the parties to agree upon the law that will be applied; but if no agreement can be reached, the arbitral panel, “tak[ing] into account the terms of the contract, the subject of the dispute, and the current usages in its respect,” applies “the substantive rules of the law it deems most closely connected to the dispute.”¹⁶³

Like Syria, Libya does not have an extensive BIT program, at least relative to Egypt.¹⁶⁴ However, unlike Syria, Libya is not a member of the ICSID convention.¹⁶⁵ Therefore, international investors in Libya will most likely have to rely on the terms of their contracts in any potential disputes. In past Libyan nationalization cases, the Petroleum Law of 1955 played a crucial role in a past arbitration experience.¹⁶⁶ As discussed earlier, oil plays a large role in the Libyan economy. The economic outlook of Libya was not much different in the 1950s when the Petroleum law was passed and established “the legal environment in which exploration for petroleum within its territory might move forward.”¹⁶⁷ Clause 16(1) of the Petroleum law states that: “The Government of Libya will take all steps necessary to ensure that the company enjoys all the rights conferred by this Concession. The contractual rights expressly created by this concession shall not be altered except by mutual consent by the parties.”¹⁶⁸ Clause 16(2) of the law continues:

¹⁵⁹ *The New Syrian Arbitration Act*, SAYED & SAYED, <http://www.sayedlaw.com/The%20New%20Syrian%20Arbitration%20Act%20No.%204%20of%202008.pdf> (last visited Mar. 30, 2012).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ See *Total BIT Libya*, *supra* note 122.

¹⁶⁵ ICSID CONVENTION, *supra* note 123.

¹⁶⁶ Mehren & Kourides, *supra* note 63, at 57.

¹⁶⁷ *Id.*

¹⁶⁸ *Multinational Corporations and United States Foreign Policy: Hearings Before the S. Comm. on Foreign Rel.*, 93th Cong. 688 (1975) (response of the Standard Oil Co. of Cal. to the Testimony of the New Eng. Petroleum Corp.)

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This concession shall throughout the period of its validity be construed in accordance with the Petroleum Law and the Regulations in force on the date of execution of the agreement of amendment by which this paragraph (2) was incorporated into this concession agreement. Any amendment to or repeal of such Regulations shall not affect the contractual rights of the Company without its consent.¹⁶⁹

Clause 16 represents a “stabilization-of-rights provision,” which “ensure[s] the concession holders the enjoyment of their rights unless they agreed otherwise.”¹⁷⁰

Now, foreign investment agreements with Libya fall within the contract structure established by exploration and production sharing agreements (EPSA).¹⁷¹ The fourth series of EPSA—EPSA IV—was introduced in 2004 and represents a more liberal approach to foreign investment than traditionally seen from the Libyan government.¹⁷² A model multiparty onshore EPSA allows disputes under the agreement to be arbitrated by three arbitrators, one each from the parties and a third arbitrator appointed by the International Chamber of Commerce.¹⁷³ Unlike the Egypt-US BIT, the model EPSA stipulates that Libyan domestic law shall govern the agreement.¹⁷⁴ Unless the nation of the foreign investor has a BIT with Libya that specifies otherwise, Libyan law will most likely be applied in any arbitration between the investors and the state.¹⁷⁵

¹⁶⁹ *Id.*

¹⁷⁰ Mehren & Kourides, *supra* note 63 at 479. The goal of a stabilization clause is to “freez[e] the effects of changes adopted by a State in its national system of law as of the date of the contract.” Vielleville & Vasani, *supra* note 112 at 11.

¹⁷¹ INTERNATIONAL ENERGY AGENCY, WORLD ENERGY OUTLOOK 2005: MIDDLE EAST AND NORTH AFRICA INSIGHTS 445 (2005).

¹⁷² WANISS A. OTMAN & KARLBERG, ERLING, THE LIBYAN ECONOMY: ECONOMIC DIVERSIFICATION AND INTERNATIONAL REPOSITIONING 68 (2007). Total, the French super major, recently renegotiated a contract to bring it under the EPSA framework. See *French Total-Led Consortiums Accept Lower Production Shares in Libya*, THE TELEGRAPH (Jan. 31, 2011, 9:31 PM). See also *Exploration & Production Operations in Africa*, TOTAL, <http://www.total.com/en/about-total/our-businesses/upstream/exploration--production/africa-922626.html> (last visited Mar. 30, 2012).

¹⁷³ *Exploration and Production Sharing Agreement Between National Oil Corporation and X and X*, EISOURCEBOOK, <http://www.eisourcebook.org/cms/files/attachments/other/Libya%20Model%20E&P%20Agreement,%20Oil%20&%20Gas.pdf>.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

C. *Pacta Sunt Servanda*

If the international investors are able to overcome the jurisdictional issues associated with bringing Libya into international arbitration, they may be able to rely on their contracts and the legal principle of *pacta sunt servanda*.¹⁷⁶ International arbitral tribunals have in many cases recognized the concept of *pacta sunt servanda*.¹⁷⁷ The Vienna Convention on Treaties includes a provision on *pacta sunt servanda* which states, “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.”¹⁷⁸ Although the Vienna Convention on Treaties addresses treaties between states, the principle of *pacta sunt servanda* has been applied to agreements between private foreign investors and the states they contract with,¹⁷⁹ whether the tribunal purported “to apply municipal law, general principles of law, or international law.”¹⁸⁰ The past Libyan arbitration cases associated with the prior era of nationalization—“the Libya trilogy”—seem to support the idea that arbitrators are likely to enforce promises made by states to private investors in contract.¹⁸¹

The concept of *pacta sunt servanda* has not only a background in international treaty law, but a religious background as well. The religious background of *pacta sunt servanda* may be helpful if an arbitration tribunal decides to look to shari’a law—which would most likely find an even greater influence in countries where Islamist parties have taken a larger share of political power—for guidance.¹⁸² Both Christianity and Islam embrace the concept of keeping one’s word to another in their teachings.¹⁸³ Shari’a law sees the contract as divine and the duty to uphold an agreement a sacred

¹⁷⁶ Yackee, *supra* note 66, at 1558–60.

¹⁷⁷ Hans Wehberg, *Pacta Sunt Servanda*, 53 AM. J. INT’L L. 775, 785 (1959).

¹⁷⁸ Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 311 (May 23, 1969). Although not every state is a party to the Vienna Convention, it is considered a reflection of “the current general international law of treaties.” Karl Zemanek, *Vienna Convention on the Law of Treaties*, AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW, <http://untreaty.un.org/cod/avl/ha/vclt/vclt.html> (last visited Mar. 30, 2012).

¹⁷⁹ Wehberg, *supra* note 176, at 786.

¹⁸⁰ Yackee, *supra* note 66, at 1602.

¹⁸¹ *Id.* at 1584–85.

¹⁸² Wehberg, *supra* note 176, at 775. Most Middle Eastern and North African nations cite Shari’a as at least a nominal influence on their legal systems. Faisal Kutty, *The Shari’a Factor in International Commercial Arbitration*, 28 LOY. L.A. INT’L & COMP. L. REV. 565, 566 (2006).

¹⁸³ Wehberg, *supra* note 176, at 775.

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one.¹⁸⁴ It has been observed that treaty and contract law is one and the same under Shari'a, with "the principle of *pacta sunt servanda* recognized by all Muslim jurist-theologians."¹⁸⁵ While it has no official precedential effect, the sole arbitrator of the TOPCO/CALASIATIC arbitration with Libya found the concept of fulfilling contracts to be a principle of Libyan law, with the sovereign held, under Islamic law, to a higher standard of performance than even the private parties of a state.¹⁸⁶

VI. CONCLUSION

Whether the Arab Spring countries see Islamist parties like the Muslim Brotherhood or the military officials take power in the new governments, international investors may see unfavorable changes made to their investments in the affected countries. The Islamist parties may push back on any liberalization that had occurred prior to the revolution in favor of laws and investment structures which are more Shari'a influenced.¹⁸⁷ Changes might also be made to investment contracts as a pushback on corrupt practices of the prior regime.¹⁸⁸ International investors may also see their investment affected as a matter of punishment for the foreign policy positions of their home country that the new government finds objectionable.¹⁸⁹ The military, or military-backed politicians, may also target foreign investment as a way to placate an agitated public.¹⁹⁰ If settlements cannot be reached between the new government actors and the international investors, arbitration will be key in deciding the outcome of potential future disputes.

The process and outcome of potential arbitration will be greatly affected by the level of participation in the international legal regime on the part of the host country. International investors who can rely on a BIT between their home country and the host state will have the highest level of protection.¹⁹¹ If the home and host state do not have a BIT, the host state may at least be a party to a convention—for example the ICSID convention, which provides

¹⁸⁴ Kutty, *supra* note 181, at 609.

¹⁸⁵ *Id.* at 610–11.

¹⁸⁶ Mehren & Kourides, *supra* note 63, at 517. In traditional Islam, the ruler is expected to "accede legitimacy and rule justly" and "is bound no less than the humblest of his slaves" to the law. LEWIS, *supra* note 98, at 91.

¹⁸⁷ OTTAWAY & HAMZAWY, *supra* note 44, at 72.

¹⁸⁸ Hyde, *supra* note 109.

¹⁸⁹ See Kirkpatrick & Salah Amer, *supra* note 72.

¹⁹⁰ Schenker, *supra* note 74.

¹⁹¹ See Guzman, *supra* note 11, at 642. A BIT will often allow for easier access to arbitration as well as the protection of treaty and international law. *Id.*

for the possibility for international arbitration as long as certain jurisdictional hurdles can be cleared. At the very least, the international investor can look to any agreements signed with the host country, which may include provisions related to the arbitration of disputes. In scenarios where there is no BIT, the international investor may look to favorable provisions in the host country's domestic law or they can appeal to the concept of *pacta sunt servanda*. The host country is not totally defenseless in arbitration proceedings that might be initiated by the parties. The host country can argue that the contracts were entered into based solely on corruption.¹⁹² An arbitration panel might decide to disregard the entire contract if it can be proven it was entered into solely on the basis of corruption.¹⁹³

Despite the possible defense to corruption, it seems international investors are fairly well protected by any changes which may occur in Egypt, Libya, and Syria. International investors can turn to BITs, membership in conventions like the one that established the ICSID, as well as domestic law of the target countries, which had been slowly adopting more liberal principles governing international investment. The target countries can also serve as examples for other countries in the region. International investors throughout the region would be wise to look at the level of engagement in the international investment legal regime of other host countries in the region as discontent continues to swirl. Despite the turmoil in the region, the evolution of international investment, and the protection offered to it both by investing and host states, makes unfavorable outcomes for international investors unlikely.

¹⁹² Hyde, *supra* note 109.

¹⁹³ *Id.*